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12 FOUCAULT, individually and as Coroner, SAN
13 MATEO COUNTY

14 ISOLINA PICON,

15 Plaintiff,

16 vs.

17 COUNTY OF SAN MATEO, ROBERT
18 FOUCAULT, individual and as Coroner, SAN
19 MATEO COUNTY

20 Defendants.

21 Case No. 08-0766 SC

22

23 **DEFENDANTS' REPLY MEMORANDUM
24 IN SUPPORT OF MOTION TO DISMISS
25 PURSUANT TO RULE 12(B)(6) OF THE
26 FEDERAL RULES OF CIVIL
27 PROCEDURE**

28 Hearing:

Date: April 4, 2008
Time: 10:00 a.m.
Judge: Hon. Samuel Conti
Courtroom: 1, 17th Floor

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1 **I. INTRODUCTION**

2 Plaintiff's confusingly-argued opposition fails to salvage the causes of action challenged in this
 3 motion. As shown below and in Defendants' moving papers, each of the Plaintiff's causes of action fails
 4 to state a claim. Further, Plaintiff's effort to impugn Defendants by suggesting they included "untruths,"
 5 "misstatements of law," and "inaccurate and misleading misstatements" "for the apparent purpose of
 6 misleading the [C]ourt" is not borne out. Opp. at 2-3. Plaintiff fails to plead facts sufficient to show the
 7 existence of a quasi-property right. She likewise fails to show how her allegations trigger a mandatory
 8 duty that was violated. She does not rebut the Defendants' showing that the California Tort Claims Act
 9 affords the Defendants immunity. She fails to show how Section 1983 permits a claim when she has not
 10 established a Constitutionally-protected property right. Finally, she has not countered Defendants'
 11 invocation of qualified immunity, conceding through her failure to even address the topic that she cannot
 12 meet her burden to allege facts showing a clearly established right that was violated. For these reasons,
 13 Defendants' motion should be granted in its entirety.

14 **II. DISCUSSION**

15 **A. Plaintiff's Contention That Defendants Misled The Court Is False.**

16 In an attempt to divert the Court's focus from her lack of effective arguments countering
 17 Defendants' Rule 12(b)(6) motion, Plaintiff expends much time on purported procedural challenges to
 18 the Defendants' motion. Each of these challenges are baseless and should be summarily rejected.

19 Plaintiff objects that Defendants' motion fails to submit an affidavit or declaration in support of
 20 Defendants' "repeated misstatements of the applicable laws...." Opp. at 2. The local rule cited by
 21 Plaintiff expressly prohibits submitting a declaration in support of legal reasoning. *See Civil Local Rule*
 22 7-5(b) ("An affidavit or declaration[] may contain only facts ... and must avoid conclusions and
 23 argument"). To the extent that Plaintiff suggests that facts discussed by the motion require a supporting
 24 declaration, she is wrong. Defendants' motion is properly based on the allegations in the Plaintiff's First
 25 Amended Complaint and the documents attached thereto. Such materials are the focus of a Rule 12(b)(6)
 26 motion—which tests the sufficiency of the allegations in the pleadings—and consequently do not require
 27 additional support. *See Mot. at 4-5 & n.2* (citing *Walter v. Drayson*, 496 F. Supp. 2d 1162, 1165 (D.
 28 Hawaii 2006), *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), and *United States*

1 *v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

2 Plaintiff also complains that “[n]umerous other misstatement[s] of law also permeate in the MTD
 3 as it pertains to California Government Code § 27491.45(a)(1),” including that “the MTD substitutes the
 4 word ‘organs’ where the statute reads ‘parts of the body’.” Opp. at 3 (emphases in original). Plaintiff
 5 fails to state where this purported misstatement of the law occurs. A review of Defendants’ motion
 6 shows no such misstatement. More importantly, Plaintiff’s citation of Section 7150.1 of the Health and
 7 Safety Code emphasizes that the definition of “part” includes “organ.” *See* Opp. at 3. Thus, Defendants’
 8 use of the term “organ” in their argument is not improper. And contrary to Plaintiff’s suggestion,
 9 Defendants provided the Court with the full relevant text of the applicable statutes. *See* Mot. at 6
 10 (quoting Gov’t Code §§ 27491.4, 27491.45(a)(1)).

11 Finally, Plaintiff says that the “most vexing” aspect of Defendants’ alleged effort to mislead the
 12 Court is that Defendants did not reference Section 27491.45(a)(2) of the Government Code. *See* Opp. at
 13 4. Because, as discussed below, there is no allegation that the organ ever left the Coroner’s custody, that
 14 section is, by its express terms, inapplicable. In any event, Defendants discussed Section 27491.45(a)(2),
 15 so Plaintiff’s allegation of omission is demonstrably false. *See, e.g.*, Mot. at 10.

16 **B. Plaintiff Fails To Show Allegations Supporting Her Causes Of Action.**

17 **1. Plaintiff’s First Cause Of Action For Denial Of A Quasi-Property Right Is
 18 Not Cognizable.**

19 Tellingly, Plaintiff fails to address a key case cited by Defendants, *Gray v. Southern Pac. Co.*,
 20 which states that “*the law recognizes no right of property as such in the dead body of a human being*[;]
 21 [t]he right is to the possession of the body, and is one recognized for the purpose of determining who
 22 shall have its custody for the purpose of burial.” 21 Cal. App. 2d 240, 246-247 (1937) (emphasis added).
 23 Instead, Plaintiff cites two inapplicable cases, makes two unsupported claims, and offers one policy
 24 argument to support her assertion that her First Cause of Action should survive the motion to dismiss, but
 25 none of these permit that cause of action to proceed.

26 To begin with, neither case cited by the Plaintiff stands for the proposition that under California
 27 law a property right exists that permits Plaintiff to recover damages on the facts as alleged. As discussed
 28 in great detail in Defendants’ opening brief, *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002),

1 is inapposite. Although *Newman* found that, for purposes of consenting or withholding consent to
 2 *anatomical gifts*, a decedent's next-of-kin have certain property interests, the Court in that case
 3 specifically noted that its holding does not extend to a coroner's retention of body parts or tissues for
 4 investigative purposes relating to autopsies. *Id.* at 797-98 & n.15 (autopsies may be conducted even
 5 when contrary to the wishes the next of kin).

6 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is likewise
 7 distinguishable. It is a takings clause case in which a state government tried to require apartment
 8 building owners to permit cable companies to install equipment on the roofs of their apartment buildings.
 9 That case—and specifically the section quoted by Plaintiff in her opposition—deals with the economic
 10 analysis associated with a permanent physical occupation by one party of another party's real property.
 11 *Id.* at 435. The case does not address property interests in bodies and therefore has no relevance here.

12 Plaintiff's other arguments fare no better. Plaintiff provides no support for her claim that
 13 Defendants' position is "in stark contrast of the existing case law." Opp. at 6. If there was such existing
 14 case law, Plaintiff would be able to cite it. Neither *Newman* nor *Loretto* lend support to the existence of
 15 the right being claimed. Plaintiff next argues that "no facts have been presented by the Coroner or the
 16 County of San Mateo that would support the argument that the heart organ of Nicholas Picon was
 17 removed and retained to further investigate his cause of death." Opp. at 7. As discussed below, Plaintiff
 18 admits through her allegations and the materials attached to the First Amended Complaint that the
 19 Coroner continued to investigate after the body was released to the Plaintiff. In any event, this issue is
 20 not relevant to the question of whether there exists a property right. Tellingly, Plaintiff fails to explain
 21 how the Coroner's purpose in retaining the heart has any relevance to the claimed property right.

22 She instead opines that

23 [i]f the position of the defendant[s] is upheld, Coroners of this state and
 24 beyond would be effectively given the green light to retain organs and
 25 body parts at will without providing notice to the next of kin. The
 argument would be that by simply returning any portion of a corpse,
 essentially an arm or a leg your 'body' has been provided for burial.

26 Opp. at 7. This contention is nonsensical at best. The Legislature gave coroners discretion to decide
 27 what tissues and organs to retain in connection with an investigation. *See* Gov't Code §§ 27491.4(a),
 28 27491.45(a)(1). The Legislature has also defined the scope of what parts may be retained by coroners by

1 referencing the Health and Safety Code, which during the relevant time defined “parts” without including
 2 the term “body.”¹ *See* Declaration of Glenn M. Levy [“Levy Decl.”], submitted concurrently herewith,
 3 Ex. A [former Health & Safety Code § 7150.1(g)]. There is no credibility to the suggestion that granting
 4 Defendants’ motion would encourage coroners to act outside the scope permitted by the Legislature.

5 **2. Plaintiff Fails To Allege Facts Constituting A Breach Of A Mandatory Duty.**

6 In support of her second cause of action for breach of a mandatory duty, Plaintiff cites Sections
 7 7150.1(g) and 7150.2(c)(1) of the Health and Safety Code and Sections 27491.4(a) and 27491.45(a) of
 8 the Government Code, which she claims that Defendants have violated.² *See* Opp. at 8. Yet Plaintiff
 9 does not cite any factual allegations in her complaint that would give rise to a violation of a mandatory
 10 duty under any of these sections.

11 **a. Neither Section Of The Health And Safety Code Imposes A Duty.**

12 Aside from any allegations in Plaintiff’s complaint, neither cited section of the Health and Safety
 13 Code imposes any duties. On the one hand, Section 7150.1(g), prior to its repeal, only listed definitions,
 14 including the definition for the term “part” referenced by Government Code Section 27491.45(a). There
 15 are simply no duties imposed by Section 7150.1(g). On the other hand, subsections (a) and (b) of Section
 16 7150.2 grant authority to the State Department of Health Services for certain purposes and requires that
 17 department to adopt certain regulations. *See* Levy Decl. Ex. B [former Health & Safety Code § 7150.2].
 18 Neither subsection imposes any duties on coroners. And the subsection of Section 7150.2 cited by
 19 Plaintiff states only that “[i]t is the intent of the Legislature that no provision of this section [*i.e.*, Health
 20 and Safety Code Section 7150.2] be construed to be in conflict with federal law.” Opp. at 4, quoting
 21 former Health & Safety Code § 7150.2(c)(1). Because neither Section 7150.1(g) nor Section 7150.2
 22 imposes any duties, neither supports a cause of action for breach of a mandatory duty.

23
 24
 25
 26 ¹ As shown in footnote 3, below, the Legislature recently changed the definition of “body part” to
 27 exclude “the whole body,” further showing the absurdity of this argument.
 28

² Section 7150.2, as with Section 7150.1, discussed in footnote 3, below, was repealed effective
 January 1, 2008.

b. Plaintiff Fails To Allege Facts Supporting A Breach Of A Mandatory Duty Imposed By Section 27491.4.

Contrary to the allegations of and information submitted with her complaint, Plaintiff makes two arguments that Section 27491.4 imposed a duty that was breached. First, Plaintiff contends that an investigation into the cause of death was complete upon return of the deceased's body and that Section 27491.4(a) consequently imposed a duty to return all tissues and organs removed during the autopsy examination. *See Opp.* at 3, 7. Second, Plaintiff attempts to differentiate between "tissues" and "organs" and thereby argues that the heart was not properly retained. *Id.* at 7. These arguments require both an incorrect interpretation of Section 27491.4 and the omission of Plaintiff's own allegations in order to impose a duty. But because Plaintiff bears a burden of pleading with particularity all facts essential to the existence of statutory liability, and because Plaintiff's complaint includes facts and information that defeat the imposition of a duty, Section 27491.4 does not support this cause of action. *See Keyes v. Santa Clara Valley Water Dist.*, 128 Cal. App. 3d 882, 886 (1982) (no duty imposed if plaintiff does not plead with particularity every fact essential to the existence of statutory liability).

Section 27491.4 expressly permits the Coroner “to retain only those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings.” Gov’t Code § 27491.4(a). As set forth in Plaintiff’s complaint, the investigation was not complete when the body was returned to the Plaintiff. Its on-going nature is confirmed by constructing a timeline of information alleged and submitted by Plaintiff.

Plaintiff alleges that the autopsy was conducted on October 26, 2006. *See* FAC at 6:3-5; Ex. A to the FAC (Autopsy Report), at 1 [unnumbered page titled “Pathology Report”] (stating date of exam to be Oct. 26, 2006). She also alleges she was informed of the cause of death that same day, and the Pathology Report indicates this was the “probable” cause of death. *See* FAC at 6:3-5; Ex. A to the FAC, at 1 [unnumbered page titled “Pathology Report”] (cause of death listed as “[p]robable cardiac disrhythmia”). She also alleges both that the body was released to her (*see* FAC at 9:13-14) and that the heart was retained by the Coroner on that same day (*see id.* at 9:18-19).

Plaintiff argues that the retention of the heart after she was told the “probable” cause of death on October 26, 2006, shows that a duty under Section 27491.4 was violated. However, the attached autopsy

1 states that while the investigation into the cause of death was initiated on October 26, 2006, “[t]he
 2 cardiac specimen [was] retained to permit further detailed examination.” Ex. A to FAC at 5. That report
 3 further states that “[t]he formalin-fixed heart [was] re-examined on 10-29-06, and two Polaroid
 4 photographs [were] taken.” *Id.* at 3. Additional measurements of the heart also taken on October 29,
 5 2006, were recorded. *Id.* Plaintiff, through her submission of this information, therefore confirms that
 6 the investigation was not complete when the body was released to her and that the investigation
 7 continued thereafter. That fact shows that the Coroner’s retention of the heart was for “inquiry into the
 8 case” or “verification of [the Coroner’s] findings,” and consequently there is not and Plaintiff cannot
 9 allege a breach of a duty imposed by Section 27491.4.

10 Faced with this factual dilemma, plaintiff claims there must be a difference between “tissues” and
 11 “organs” under Section 27491.4 such that the Coroner’s retention of the entire heart organ was not
 12 authorized. Plaintiff’s strained reading of the statute in this regard lacks merit.

13 Title 3, Division 2, Part 3, Chapter 10 of the Government Code addresses various functions of the
 14 office of coroner. *See* Gov’t Code §§ 27460-27530. Based on Plaintiff’s allegations, there is no dispute
 15 that the Coroner was authorized to investigate the cause of death in the present situation. *See* FAC at 4
 16 (describing the circumstances of the death); *see also* Opp. at 7 (the ability of the Coroner to conduct an
 17 autopsy “is a non-issue”). The Coroner’s authority to investigate is partially addressed by Section
 18 27491.4(a), which grants the corner “discretion … [to] make or cause to be made a postmortem
 19 examination or autopsy [of the body], and make or cause to be made an analysis of the stomach, stomach
 20 contents, blood, organs, fluids, or tissues of the body.” Gov’t Code § 27491.4(a). The Coroner is thus
 21 permitted to analyze both *tissues* and *organs*, and it is inherent in the Coroner’s authority to analyze an
 22 organ like the heart that the heart may need to be removed.

23 Plaintiff argues that because Section 27491.4(a) only mentions “tissues,” and not “organs,” when
 24 it speaks of the authority to retain samples, the facts here show a breach of a duty. But this interpretation
 25 strains reason and does not make sense in the context of the overall statutory scheme. To begin with,
 26 neither “tissues” nor “organs” are defined for purposes of Section 27491.4. Where such terms are not
 27 defined, the entire statutory scheme should be examined to ascertain their meaning. *See, e.g., Copley*
Press, Inc. v. Superior Court, 39 Cal. 4th 1272, 1288 (2006) (when “the relevant statutes do not define

1 the term,” the “operative statutory language” is viewed “in the context of the entire statutory scheme” to
 2 determine the meaning); *Noble v. Franchise Tax Bd.*, 118 Cal. App. 4th 560, 568 (2004) (same).

3 Here, the statutory context is clear. A coroner has the right to examine and analyze *tissues* and
 4 *organs*. See Gov’t Code § 27491.4(a). A coroner has the right to retain tissues needed for inquiry into
 5 the case or for verification of his or her findings. *Id.* And, as discussed below, a coroner has the right to
 6 retain “parts of the body” at his or her discretion that may be “necessary or advisable for scientific
 7 investigation and training.” *Id.* § 27491.45(a)(1). When defining what may be retained, the legislature
 8 referenced the former Health and Safety Code provision that explicitly included “tissues” and “organs.”
 9 See Levy Decl. Ex. A [former Health & Safety Code § 7150.1(g)]. Because the Coroner has discretion
 10 both to remove tissues and organs during an investigation and to retain tissues and organs for “scientific
 11 investigation and training” after an investigation, Plaintiff’s contention that the Coroner may only retain
 12 “tissues” but not “organs” is devoid of common sense. This result runs counter to legal principles and
 13 cannot lead to the imposition of a duty here. See *In re County of Orange*, 262 F.3d 1014, 1018 (9th Cir.
 14 2001) (statute to be construed to avoid “absurd” result); *Seattle-First Nat’l Bank v. Conaway*, 98 F.3d
 15 1195, 1197 (9th Cir. 1996) (plain meaning of a statute controls unless it leads to absurd or impracticable
 16 consequences); *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737
 17 (2004) (“If the [statutory] language is clear, courts must generally follow its plain meaning unless a
 18 literal interpretation would result in absurd consequences the Legislature did not intend”).

19 Even assuming that Section 27491.4(a) on its own did not authorize the retention of the heart,
 20 Section 27491.45(a)(1)—discussed next—explicitly permits the retention of the heart under these
 21 circumstances. Because there cannot be a violation of a mandatory duty in relation to one statute where
 22 another statute explicitly permits the action in question, the Plaintiff’s allegations in relation to Section
 23 27491.4(a) are insufficient to support the Second Cause of Action.

24 **c. Plaintiff’s Allegations Similarly Do Not Support Imposition Of A Duty
 25 Under Section 27491.45.**

26 The Coroner has the “right to retain parts of the body, as defined in subdivision (g) of Section
 27 7150.1 of the Health and Safety Code, removed at the time of autopsy or acquired during a coroner’s
 28 investigation as may, in the opinion of the coroner, be necessary or advisable for scientific investigation

1 and training.” Gov’t Code § 27491.45(a)(1). The referenced definition of the term “part” in the Health
 2 and Safety Code includes the word “organ.”³ Plaintiff not only does not dispute this, she also concedes
 3 in her complaint that the heart (the “cardiac specimen”) was retained to “permit further detailed
 4 examination.” FAC at 7, quoting Autopsy Report at 5. Plaintiff’s complaint further acknowledges that
 5 this means the heart was retained for “scientific study” and “scientific investigation and research.” FAC
 6 at 5-6. In other words, Plaintiff concedes that the heart was retained for the very “scientific investigation
 7 and training” permitted by Section 27491.45(a)(1).

8 Plaintiff unsuccessfully attempts to get around this complete defense to the imposition of a
 9 mandatory duty by suggesting that the Coroner breached the requirements of Section 27491.45(a)(2).
 10 Subsection (a)(2) requires consent *only* when a body part, including an “organ” under the definition of
 11 former Health and Safety Code Section 7150.1(g), is actually released by the Coroner to outside
 12 institutions “for *noncoroner* training, educational, and research purposes.” *Id.* (emphasis added).
 13 Plaintiff’s First Amended Compliant, however, does not allege that the heart ever left the custody of the
 14 Coroner or that the organ was used for any noncoroner purposes. The attached autopsy report states that
 15 the “cardiac specimen [was] retained to permit further detailed examination”—a task that is investigatory
 16 and a “coroner purpose” by definition. And Plaintiff alleges that the heart was returned to the Plaintiff
 17 upon her request *by the Coroner’s office* and not from any third party. Subsection (a)(2) is therefore
 18 inapplicable, and no mandatory duty can have been imposed by that subsection.

19 **3. Defendants Have Immunity Under The California Tort Claims Act.**

20 Both the Coroner and the County are immune from liability under the California Tort Claims Act.
 21 *See* Mot. at 9-10. Rather than attempting to show that the language of Sections 820.2 and 815.2(b) are
 22

23
 24 ³ In 2007 the California Legislature repealed Section 7150.1 of the Health and Safety Code. Prior to its
 25 repeal, Section 7150.1 stated: “‘Part’ means an organ, tissue, eye, bone, artery, blood, fluid, or other
 26 portion of a human body or a pacemaker.” *See* Levy Decl. Ex. A. That language has been re-
 27 codified as Section 7150.10 of the Health and Safety Code, which now states, “‘Part’ means an
 28 organ, an eye, or tissue of a human being. The term does not include the whole body.” Health &
 Safety Code § 7150.10(a)(18). Although the Legislature did not amend Section 27491.45(a)(1) to
 reflect this change, the events at issue in this case are governed by the prior language. Regardless,
 both definitions include “organ” as part of the term “part.”

1 inapplicable here, Plaintiff offers two inadequate arguments challenging tort immunity. First, Plaintiff
 2 provides a block quote on the issue of statutory interpretation. *See* Opp. at 9 (quoting *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1238-40 (1992)). The quoted language is inapplicable to
 3 the question of immunity under the Tort Claims Act.
 4

5 Second, Plaintiff claims without support that she “has provided facts to support a claim of
 6 negligence that if proven at trial would entitle her to relief.” Opp. at 9. This claim misses the mark in
 7 fundamental ways. To begin with, such unsupported statements are generally inadequate to challenge a
 8 dispositive motion. *See, e.g., Taylor v. List*, 880 F.2d 1040, 1045-46 (9th Cir. 1989) (on a motion for
 9 summary judgment, assertion of “conclusory allegations unsupported by factual data” is insufficient to
 10 oppose motion). But more importantly, it does not matter whether she has provided facts “to support a
 11 claim of negligence.” The point of tort immunity is that no cause of action can be sustained against the
 12 government or its employees, even when negligence was present. Regardless of whether Plaintiff has
 13 alleged negligence, both the Coroner and the County are immune from having to defend such a cause of
 14 action because no liability can be imposed on them for negligence based on the facts as alleged.

15 Plaintiff also fails to address the plain language of Section 27491.4, which, as noted above, grants
 16 discretion to the Coroner both to conduct an investigation and to retain tissues that are “necessary or
 17 advisable” for either inquiry into the case or verification of the Coroner’s findings. Gov’t Code §
 18 27491.4(a). On the facts alleged and information submitted by Plaintiff, the Coroner retained the heart
 19 for just such purposes. And the Plaintiff fails to address the discretion granted to the Coroner under
 20 Section 27491.45(a)(1), which applies given that the heart was never alleged to have left the Coroner’s
 21 custody. Accordingly, as alleged by Plaintiff, the Coroner’s office was acting within the range of
 22 discretion granted to it, and therefore neither the Coroner, as a public employee, nor the county can be
 23 held liable for negligence on these allegations. *See* Gov’t Code §§ 820.2 (public employee immune to
 24 non-statutory claims arising out of exercise of employee’s discretion), 815.2(b) (no liability for public
 25 entity where employee immune from liability).

26 **4. Plaintiff’s Conclusory Opposition Fails To Show A Right Entitling Her To
 27 Relief Under Section 1983 And Fails To Meet Her Burden Of Showing The
 Inapplicability Of Qualified Immunity.**

28 Plaintiff’s argument on her final cause of action consists of unsupported claims that a property

1 right exists so as to support application of 42 U.S.C. § 1983 and that there is no basis for application of
 2 qualified immunity. On the first point, as discussed above, Plaintiff provides no support other than two
 3 distinguishable cases. Without a showing of the existence of such a property right, there is nothing that
 4 can trigger a cause of action under Section 1983.

5 Further, Plaintiff devotes only three sentences that even arguably respond to Defendants'
 6 invocation of qualified immunity. *See* Opp. at 10. Plaintiff claims "[t]he allegations of the complaint
 7 ha[ve] provided factual claims under which plaintiff may recover and therefore this complaint should not
 8 be dismissed and there should be a trial on the merits." Opp. at 10. Given the lack of any support, this
 9 conclusory statement should be treated as a concession of the applicability of qualified immunity in light
 10 of the Plaintiff's burden. *See* Mot. at 13; *see also Davis v. Scherer*, 468 U.S. 183, 197 (1984) (burden is
 11 on plaintiff to establish that the rights she claims were violated are "clearly established").

12 Plaintiff's further claim that "the issue is whether the existing law provided adequate due
 13 process" is wrong. Opp. at 10. The issue on a claim of qualified immunity is not "whether the existing
 14 law provided adequate due process." The point of qualified immunity is to give government employees
 15 who lack legal expertise the ability to perform their duties without having to second-guess every
 16 decision. Accordingly the question is framed in terms of whether the right at issue was established so
 17 clearly that the employee at the time would have had notice of that right. On the Plaintiff's allegations,
 18 the question is whether, notwithstanding the statutory authority to the contrary, there existed at the time
 19 of the autopsy a clearly established right prohibiting the Coroner from retaining the deceased's heart for
 20 purposes of further "inquiry into the case," "verification of [the Coroner's] findings," or "scientific
 21 investigation and training." Gov't Code §§ 27491.4(a), 27491.45(a)(1). Plaintiff has not come close to
 22 meeting her burden in showing such a right. Aside from the statutes expressly authorizing the Coroner's
 23 office to act exactly as it did on the facts as alleged, Plaintiff cites no authority for the proposition that
 24 such a right was clearly established. In failing to show such a right, Plaintiff's Fourth Cause of Action is
 25 barred by qualified immunity. *See Act-Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

26 **IV. CONCLUSION**

27 For the reasons outlined in Defendants' briefs, their motion to dismiss should be granted.

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1 Dated: March 21, 2008

Respectfully submitted,

2 MICHAEL P. MURPHY, COUNTY COUNSEL

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4 By: _____/s/

5 Glenn M. Levy, Deputy

6 Attorneys for Defendants
7 COUNTY OF SAN MATEO and ROBERT
FOUCRAULT, individual and as Coroner, SAN
8 MATEO COUNTY

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